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IN THE

Supreme Court of the United States

October Term, 1970

No. 548

HERBERT L. ELY, Individually and as Chairman of the Democratic Party of Arizona,

Appellant,

v.

GARY PETER KLAHR, JACK WILLIAMS, Governor of the State of Arizona, and WESLEY BOLIN, Secretary of State of Arizona,

Appellees.

APPELLEES' ANSWERING BRIEF

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APPELLEES' ANSWERING BRIEF

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellees agree to the constitutional and statutory provisions set forth in Appellant's Brief.

QUESTION PRESENTED

The question presented for review is whether or not

the District Court has fashioned a full and complete remedy to Arizona's apportionment and districting problems when it compels the Legislature to reapportion according to the very latest, most complete census figures available, namely, the 1970 decennial census report, such reapportionment to be completed a full year before the new plan would have any practical effect in the 1972 elections, leaving ample time for judicial determination of the constitutional validity of the new plan.

SUMMARY OF ARGUMENT

A question is moot when, as here, judicial action will not or cannot repair the alleged injury. The 1970 elections, the only elections which will ever be held under the apportionment scheme whose constitutionality was decided in the District Court below, have already been held. Appellant does not challenge the outcome or the validity of those elections.

The Legislature is already under judicial compulsion to accomplish a valid reapportionment plan by November 1, 1971, although that plan will have no practical effect until the elections of 1972. Not only is there ample time before the 1972 elections for the Legislature to reapportion, there is ample time and judicial machinery readily available for that plan to be tested.

We therefore respectfully submit that there is nothing which this Court can do which will be more effective than what is already being done.

This Court has established a wise line of precedents in refraining from disturbing District Court rulings on reapportionment cases which are in the posture of the case at bar. The landmark cases of 1964 recognize that primary responsibility for reapportionment rests with the

Legislature rather than the judicial system. This Court has consistently upheld District Court rulings in reapportionment cases where the remedy fashioned below closely paralleled that in the case at bar.

The Legislature is now, perhaps for the first time, equipped to do an adequate job of reapportioning and redistricting. Obsolescence of census figures, a barrier which would render any plan suspect, can now be overcome through the use of the 1970 decennial statistics. The Legislature, with the help of computer technology, has already exhibited its good faith and its willingness to abide by the mathematical exactitude prescribed by this Court in the latest reapportionment cases. As mentioned earlier, there is ample time for a new legislative apportionment and districting plan to be promulgated and judicially tested before the 1972 elections.

ARGUMENT

I

THIS CASE IS MOOT FOR LACK OF A CASE OR CONTROVERSY

A question is moot when, as here, judicial action will not or cannot repair the alleged injury. Chief Justice Warren discussed the requirement of a case or controversy in *Flast v. Cohen*, 392 U.S. 83 (1968), where he said:

> "In part those words limit the business of federal courts to questions presented... in a form historically viewed as capable of resolution through the judicial process." 392 U.S. at 95.

In the case at bar we have a situation which cannot be

further resolved at this point by any action this Court may decide to take.

The single issue presented is the wisdom of the District Court ruling that Arizona's latest reapportionment plan, while partially unconstitutional, was workable enough for purposes of the 1970 elections, but would be set aside thereafter and the Legislature ordered to draw a new apportionment plan based on the 1970 decennial census figures. This new plan is to be completed not later than November 1, 1971, and if this plan is felt to be invalid, "any party to this action may apply to the court for appropriate relief." *Klahr v. Williams*, 313 F.Supp. 148, 154 (D.Ariz. 1970).

The 1970 elections, the only ones which will ever be held under the now invalid plan, have already been held. Neither the validity nor the outcome of those elections has been challenged by Appellant. Appellant does not allege any injury from the latest elections, and does not ask this Court to tamper with the results thereof.

We further note that the redistricting and reapportionment that the Arizona Legislature is already under judicial compulsion to accomplish by November 1 of this year will have no practical effect until the elections of 1972. Not only is there ample time for the Legislature to draw up a valid plan, the District Court ruling leaves additional time for that scheme to be judicially tested before it goes into effect.

By the time this matter is heard before this Court and a decision handed down, it will be closely approaching the deadline already set by the court below. It is obvious that there is little this Court can do which will be more effective than what is already being done. The case is, at this point, not "capable of resolution through the jud-

icial process", and should therefore be dismissed as moot.

II

ASSUMING ARGUENDO THAT THE CASE IS NOT MOOT, THIS COURT SHOULD FOLLOW ITS EARLIER PRECEDENTS AND REFRAIN FROM INTERFERING WITH THE REMEDY FASHIONED BY DISTRICT COURTS IN REAPPORTIONMENT CASES SUCH AS THE ONE AT BAR

The task of accomplishing a valid plan for apportionment rests with the Legislature. In *Reynolds v. Sims*, 377 U.S. 533 (1964), the then Chief Justice, speaking for the majority, commended the District Court for its decision, "...not to usurp the primary responsibility for reapportionment which rests with the Legislature." 377 U.S. at 586.

The sole issue of this case is the wisdom of the District Court's decision to allow the Legislature to set its own house in order. The constitutionality of any given apportionment scheme is not in issue here. In two similar cases this Court has given generous approval to the same sort of remedy fashioned by the court below.

In *Reynolds v. Sims, supra*, this Court commended the court below, saying:

> "In retaining jurisdiction while deferring a hearing on the issuance of a final injunction in order to give the provisionally reapportioned legislature an opportunity to act effectively, the court below proceeded in a proper fashion." 377 U.S. at 587.

Shortly thereafter, in *Davis v. Mann*, 377 U.S. 678 (1964), this Court again approved action by a lower court which paralleled the District Court's ruling:

> "Since the District Court stated that it was retaining jurisdiction and that plaintiffs could seek further appropriate relief, the court below presumably intends to take further action should the Virginia Legislature fail to act promptly in remedying the constitutional defects in the State's legislative apportionment plan." 377 U.S. at 693.

Appellees respectfully and earnestly submit that this Court should not now dispute the wisdom of the District Court's ruling when it has consistently upheld similar rulings by courts below in cases which so closely parallel the case at bar.

III

NOW ARMED WITH THE NEW DECENNIAL CENSUS FIGURES, THE LEGISLATURE IS EQUIPPED TO DRAW A VALID PLAN FOR REDISTRICTING AND REAPPORTIONMENT WITH THE USE OF CURRENT POPULATION FIGURES

Arizona's redistricting and reapportionment problem, like that of other states, has been magnified by the unavailability of up-to-date census figures. As Mr. Justice Harlan noted in his dissent in *Wells v. Rockefeller*, 394 U.S. 542 (1969):

> "Census figures themselves are inexact; our mobile population rapidly renders them obsolete; large

groups of ineligible voters are unevenly distributed throughout the State." 394 U.S. at 550.

Mr. Justice Fortas pointed to the problem with Missouri's reapportionment attempts in his dissent to *Kirkpatrick v. Priesler*, 394 U.S. 526 (1969):

> "The base to which Missouri's legislature should have adhered precisely, according to the majority, is the 1960 decennial census. The legislature's plan here under review was enacted in 1967. Assuming perfect precision for the 1960 census when taken, by 1967, because of the movement of population within the State as well as in-and-out migration, substantial disparities had arisen between the real distribution of population in the State and that reflected in the 1960 census base..." 394 U.S. at 539, 540.

Considering the volatile nature of Arizona insofar as growth and expansion are concerned, it is obvious that the disparities noted by Mr. Justice Fortas were greater here than in Missouri, particularly when we were concerned with the last possible election after the 1960 decennial census. Indeed, the District Court recognized the almost impossible problem faced by the Legislature:

> "In truth, it appears that the lack of an official state census since 1960, accompanied by the large increase in population since 1960, has understandably left the Legislature uncertain as to how to arrive at a valid population basis for reapportionment and redistricting." *Klahr v. Williams*, 313 F. Supp. at 153.

With the 1970 census figures, the Arizona Legislature will be well equipped to draw a valid plan for the redistricting and reapportionment of the state in order to

comply with the "one man, one vote" mandate of this Court.

The Legislature has already shown its good faith, as is evidenced by the extremely small deviation figures which resulted from the computerized plan which was the last attempt at reapportionment. While ruling that the Legislature used an incorrect population conversion formula, the District Court noted:

> "The legislative districts produced with the aid of the computer do have a remarkably small deviation from the ideal or the norm, ranging between one district with a +.81% deviation and a district with a -.99% deviation, or a total deviation range of 1.8% ..." 313 F.Supp. at 152.

With the guidelines laid down by the *Kirkpatrick* and *Wells* decisions, *supra*, with the use of computer technology, and armed with accurate statistical information as to census figures, the Legislature will have little difficulty in drawing up a valid plan for redistricting and reapportioning Arizona prior to November 1, 1971.

We further note that here, as in the case of *Wells v. Rockefeller, supra*:

> "...[A]mple time remains to promulgate a plan meeting constitutional standards before the election machinery must be set in motion for the [next] election." 394 U.S. at 547.

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IV

THIS COURT SHOULD NOT MAKE AN UNWARRANTED INTRUSION INTO THE BUSINESS OF THE LEGISLATURE BY RULINGS BEYOND THE SCOPE OF ESTABLISHED NOTIONS OF JUDICIAL REVIEW

We note Mr. Justice Harlan's comment in his dissent to the *Wells* decision, *supra*:

> "This all-pervasive distrust of the legislative process is completely alien to established notions of judicial review." 394 U.S. at 550.

Mr. Justice White, dissenting in that same opinion, pointed out another danger if this Court demands unreasonable exactitude in reapportionment cases, when he said:

> "Ultimately, the courts may be asked to decide whether some families in an apartment house should vote in one district and some in another, if that would come closer to the standard of apparent equality. Using the spacious language of the Equal Protection Clause to inject the courts into these minor squabbles is an unacceptable pre-emption of the legislative function." 394 U.S. at 556.

The Legislature of the State of Arizona, in a dedicated attempt to follow the mandate of *Kirkpatrick v. Priesler* and *Wells v. Rockefeller*, *supra*, achieved numerical equality in each district of less than one per cent, as provided by the updating of the 1960 census figures. The Legislature stands ready, willing and able to follow the mandate of the District Court to use 1970 decennial cen-

sus figures with the same abject obedience to the mandate of *Kirkpatrick* and *Wells* as to numerical equality.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this question is now moot, and the Legislature will proceed to carry out its responsibilities as per the direction of the District Court.

Respectfully submitted,

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